IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 1012

HONORABLE PEIRSON M. HALL,
Judge of the United States
District Court for the
Southern District of
California,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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HONORABLE PEIRSON M. HALL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Peirson M. Hall, Judge of the United States District Court for the Southern District of California, appearing by the undersigned counsel appointed as a special committee for such

purpose by the Los Angeles Bar Association, and respectfully petitions that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Ninth Circuit in that certain cause entitled "United States of America, Petitioner, v. Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, Respondent," and numbered 10736 in the records of said Circuit Court of Appeals.

A. THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed November 25, 1944, and is reported at 145 F. (2d) 781. It is also set forth at R. 91-98 and in Appendix A attached at the end of the brief appended hereto.

The hearing in the United States Circuit Court of Appeals for the Ninth Circuit followed a petition by the United States of America, the respondent here, for a writ of mandamus directing the petitioner here, as United States District Judge, "(1) to recognize the authority of the Attorney General to assign to Mr. Irl D. Brett and/or members of his staff, independently of the United States Attorney's office, condemnation matters arising in the Southern District of California, and more particularly the proceeding entitled United States v. 1,960 Acres of Land

in Riverside County, California, No. 2567-PH; (2) to recognize the authority of Mr. Irl D. Brett and/or his assistants to represent the United States in such proceedings; and (3) to accept and assume jurisdiction over all pleadings and motions which Mr. Irl D. Brett and/or his assistants may file on behalf of the United States in condemnation proceedings brought or pending in Judge Hall's court." (R. 94.)

The Circuit Court of Appeals thereafter ordered a writ of mandamus to issue in accordance with its opinion (R. 91-98), and denied a rehearing on December 30, 1944 (R. 99).

The decision of the District Court, referred to in the opinion of the Circuit Court of Appeals (R. 98), is reported at 54 F. Supp. 867 (D.C.S.D.Cal. 1944).

B. SUMMARY STATEMENT OF THE MATTER INVOLVED.

A statement of the case is set forth in the opinion of the Circuit Court of Appeals, reported in 145 F. (2d) at pages 782-783, and in Appendix A hereto attached; and petitioner requests leave, in the interest of brevity, to incorporate that portion of the opinion of the Circuit Court of Appeals by reference here, to serve as a summary statement of the matter involved (R. 91-94).

C. JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court to review the cause by writ of certiorari is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 938; 28 U.S.C.A. § 347(a).

D. QUESTIONS PRESENTED FOR REVIEW.

The following questions are presented for review in this cause:

(1) Does the Attorney General have the power to circumvent or disestablish the office of the United States District Attorney in any district by opening a branch office of the Department of Justice in such district? (R. 91-92.)

(2) Does the Attorney General have the power "to assign to Mr. Irl D. Brett (a special assistant to the Attorney General) and/or members of his staff, independently of the United States Attorney's office, condemnation matters arising in the Southern District of California?" (R. 94.)

(3) Does a special assistant to the Attorney General have the power to stipulate for the entry of a money judgment against the United States in a condemnation case? (R. 93-94.)

E. REASONS FOR GRANTING THE WRIT.

The writ prayed for should be allowed for the following reasons:

(1) The Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

This question is whether the Attorney General of the United States has the power to open a branch office in any district and thus circumvent or disestablish, wholly or in part, the office of United States District Attorney as the law office for the United States in such district. The question is one of great importance in the administration of justice and in the proper functioning of the legal officers who represent the Government. The interrelation of the Department of Justice and the office of United States District Attorney under the Act of September 24, 1789 (1 Stat. 92, c. 20, § 35; R.S. § 771; 28 U.S.C.A. § 485) the Act of March 2, 1889 (25 Stat. 941, c. 411, § 1; 40 U.S.C.A. § 256), and the Act of June 30, 1906 (34 Stat. 816, c. 3935; 5 U.S.C.A. § 310) should be settled by this Court.

(2) The Circuit Court of Appeals for the Ninth Circuit has, secondly, decided an important question of federal law which has not been, but should be, settled by this Court; namely, whether the Attorney General of the United States has the power to assign the prosecution of condemnation cases to one of his special assistants and the

latter's staff of special attorneys, to be handled independently of the office of United States District Attorney in the Southern District of California, or in any other district. This question is likewise one of importance in the conduct of federal litigation and should be settled by this Court. Statutes involved in the determination of this question are the Act of September 24, 1789 (1 Stat. 92, c. 20, §35; R.S. §771; 28 U.S.C.A. §485), the Act of March 2, 1889 (25 Stat. 941, c. 411, §1; 40 U.S.C.A. §256), and the Act of June 30, 1906 (34 Stat. 816, c. 3935; 5 U.S.C.A. §310).

(3) The Circuit Court of Appeals for the Ninth Circuit has, thirdly, decided an important question of federal law which has not been, but should be, settled by this Court; namely, whether a special assistant to the Attorney General may stipulate to a money judgment against the United States in condemnation cases. The question is one of considerable importance in view of the widespread practice illustrated by the facts in the case at bar. Statutes involved in the consideration of this question are the Act of February 26, 1931 (46 Stat. 1421, c. 307, §1; 40 U.S.C.A. 258a), and the Act of October 21, 1942 (56 Stat. 797, c. 618; 40 U.S.C.A. §258f).

(4) The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the United States Court of Appeals for the District of Columbia

in Moody v. Wickard, 136 F. (2d) 801 (1943), cert. denied 320 U. S. 375, 64 S. Ct. 89, 88 L. ed. (Adv. Ops.) 46 (1943).

In Moody v. Wickard, supra, the court held that an officer of the United States has no power to stipulate or otherwise to consent to the entry of a money judgment against the Government in a condemnation case. Contrariwise, the opinion of the Circuit Court of Appeals in the case at bar in effect orders petitioner, as United States District Judge, to accept a stipulation for a money judgment signed by a special assistant to the Attorney General (R. 94). Since this practice is in apparent conflict with the rule stated in Moody v. Wickard, supra, this Court should resolve the uncertainty thus existing in this highly active field.

WHEREFORE, your petitioner, Peirson M. Hall, Judge of the United States District Court for the Southern District of California, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered 10736 and entitled on its docket "United States of America, Petitioner, v. Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, Respondent"; that the said judgment of the said Circuit Court of Appeals may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated: February 27, 1945.

Peirson M. Hall.

(Peirson M. Hall)
Judge of the United States
District Court for the
Southern District of California.

Petitioner

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Los Angeles 13, California.

Counsel for the Petitioner, appointed as a special committee for such purpose by the Los Angeles Bar Association.

Gordon F. Hampton

of Counsel.

CERTIFICATE OF COUNSEL

We, and each of us, hereby certify that in our opinion the foregoing petition is well founded; that it is not interposed for delay and that the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

Lasher B. Gallagher
(Lasher B. Gallagher)

William C. Mathes
(William C. Mathes)

Counsel for Petitioner.

THE UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)
STATE OF CALIFORNIA)

PEIRSON M. HALL, being first duly sworn, deposes and says: That he is the petitioner herein; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters, he believes them to be true.

Peirson M. Hall

Subscribed and sworn to before me

this 27th day of February, 1945.

Helen A. Casto
Notary Public in and for the
County of Los Angeles,
State of California.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. _____

HONORABLE PEIRSON M. HALL,
Judge of the United States
District Court for the
Southern District of
California,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I

THE OPINIONS OF THE COURTS BELOW.

Full references to the opinions of the United States Circuit Court of Appeals for the Ninth Circuit (145 F. (2d) 781) and to the decision of the District Court referred to therein (54 F. Supp. 867) are given in the

petition under "A. The Opinions of the Courts Below"; and petitioner requests leave, in the interest of brevity, to incorporate that portion of the petition by reference here.

II

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court to review the cause by writ of certiorari is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 938; 28 U.S.C.A. § 347(a).

III

STATEMENT OF THE CASE.

A statement of the case is set forth in the opinion (R. 91-94) of the Circuit Court of Appeals, which is reported in 145 F. (2d) at pages 782-783, and in Appendix A attached hereto; and petitioner requests leave, in the interest of brevity, to incorporate by reference that portion of the opinion into this brief.

IV

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in holding that the Attorney General of the United States has the power to open a branch office in any district and thus circumvent or disestablish the office of United States District Attorney as the law office for the United States in such district (R. 92-93).

(2) The Circuit Court of Appeals erred in holding that the Attorney General of the United States has the power to assign the prosecution of condemnation cases in a given district to one of his special assistants and the latter's staff of special attorneys, to be handled independently of the office of United States District Attorney in such district (R. 94, 96).

(3) The Circuit Court of Appeals erred in holding that a special assistant to the Attorney General may stipulate to a money judgment against the United States in a condemnation case (R. 95, 98).

V

SUMMARY OF THE ARGUMENT.

A. It is the specific statutory duty of the United States District Attorney to institute and prosecute land condemnation proceedings.

B. The Attorney General has no authority to circumvent or disestablish the office of District Attorney by opening a branch office of the Department of Justice in the district.

C. The decision of the Circuit Court of Appeals at bar is believed to be in conflict with the decision of the Court of Appeals for the District of Columbia in Moody v. Wickard, 136 F. (2d) 801 (cert. denied 320 U. S. 775, 64 S. Ct. 89, 88 L. ed. (Adv. Ops.) 46 (1943)).

VI

ARGUMENT.

A. It is the specific statutory duty of the United States District Attorney to institute and prosecute land condemnation proceedings.

The Act of September 24, 1789, states the duties of the United States District Attorney as follows:

> "It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury." (1 Stat. 92, C.20, § 35; R. S. 771; 28 U.S.C.A. § 485.)

In United States v. Johnson, 173 U. S. 363 376-377 (19 S. Ct. 427; 43 L. ed. 731, 736 (1899)), this Court said:

> "We are of the opinion that within the

reasonable meaning of that section (28 U.S.C.A. §485) the proceedings instituted in the Federal court by District Attorney Johnson to condemn the lands in question for the benefit of the United States constituted a civil action in which the government was concerned; and that in following the directions of the Attorney General to institute such proceedings and have the lands referred to condemned for the United States he was only discharging an official duty imposed upon him by statute."

Moreover, on March 2, 1889, Congress enacted a statute now Section 256 in Title 40 of the United States Code, as follows:

"All legal services connected with the procurement of titles to site for public buildings, other than for life-saving stations and pierhead lights, shall be rendered by United States district attorneys; Provided, That in the procurement of sites for such public buildings, it shall be the duty of the Attorney General to require of the grantors in each case to furnish, free of all expenses to the Government, all requisite abstracts,

official certifications and evidences of title that the Attorney General may deem necessary." (25 Stat. 941; 40 U.S.C.A. § 256.)

Thus, it is the clear statutory duty of the District Attorney to prosecute condemnation cases in his capacity as the law officer for the United States in his particular district. The Attorney General himself has so construed Section 256 of Title 40. (Instructions to United States Attorneys etc. (1929) §§ 1115-1117, p. 189; § 975, p. 169; §§ 985-987, pp. 170-171.)

Contrary to the opinion of the Circuit Court of Appeals in the case at bar (R. 92), we submit that the District Attorney cannot, by "assent", relieve his office of the prosecution of all condemnation cases. That is a function which may be separable from the man, but is inseparable from the office.

Congress imposed the duty; and Congress alone can relieve the office of United States Attorney from it.

B. The Attorney General has no authority to circumvent or disestablish the office of District Attorney by opening a branch office of the Department of Justice in the district.

That the district attorney is the law officer of the United States in his district cannot be doubted. This is true both in a statutory (R.S. §§767,769; 28 U.S.C.A. §§481-482) and in a constitutional sense. Thus the presidential appointment of a district attorney must be confirmed by the Senate (U. S. Const., Art. II, §2, cl.2). He is, then, much more than a mere deputy or assistant to the Attorney General. He is independently appointed and confirmed as an officer of the United States - a resident of his district conversant with local affairs.

The Attorney General exercises "general superintendence and direction" over district attorneys, but only "as to the manner of discharging their . . . duties." (R.S. §362; 5 U.S.C.A. §317.) Congress has never conferred upon the Attorney General the power entirely to relieve the office of district attorney from duties imposed by statute.

During the first part of the present war period, special assistants to the Attorney General conducted all condemnation cases in the Southern District of California in association with the office of the District Attorney. The District Attorney appeared of record in all cases, and all pleadings contained his signature (R. 91-92).

Then, on September 1, 1943, pursuant to a "directive" from the Attorney General, prosecution of all condemnation cases was separated from the office of the District Attorney in the Southern District of California (R. 92). In Los Angeles there was opened an "office" of the "Lands Division, Department of Justice" (R. 92), and a special assistant to the Attorney General and his "staff" of special attorneys took full charge of all condemnation cases.

This circumvention of the office of District Attorney is sought to be justified under the provisions of the Act of June 30, 1906 (34 Stat. 816; 5 U.S.C.A. §310) which reads:

> "The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought." (Underscoring added.)

The "provision of law" referred to in Section 310 is manifestly Section 312 of Title 5 U.S.C.A. (R.S. §363) which provides that:

> "The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties . . ." (Underscoring added.)

There is nothing in Section 310 permitting the establishment of an "office" of the Lands Division in Los Angeles separate and apart from the office of District Attorney. Indeed, the very purpose of Section 310 was to allow the wider use of special assistants to the Attorney General "to assist the district attorneys in the discharge of their duties" (5 U.S.C.A. §312; R.S. §363).

As the court said in United States v. Sheffield Farms Co., 43 F. Supp. 1, 3 (D.C.S.D.N.Y., 1942):

> "An examination of the legislative history of Section 310 indicates that its passage in June, 1906, resulted from the decision in United States v. Rosenthal, 121 F. 862, decided on March 17, 1903, by the Circuit

Court, S.D., N.Y., which held that neither the Attorney General, nor his special assistants, nor any officer of the Department of Justice were authorized to conduct or aid in the conduct of proceedings before a Grand Jury, and that only the United States District Attorney had such authority. (See House Report No. 2901, 59th Congress, 1st Session).

Mr. Gillette, in the House Report said:

"'The purpose of this bill is to give to the Attorney General or to any officer in this Department or to any attorney specially employed by him, the same rights, powers and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury . . .'

"'The Attorney General states that it is necessary . . . that he shall be permitted to employ special counsel to assist the district attorney . . . in cases of unusual importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney which, of course, includes his

right to appear before a grand jury either with the district attorney or alone.

"'It seems eminently proper that such power and authority be given by law. It has been the practice to do so in the past and it will be necessary that this practice shall continue in the future.'" (Underscoring added.)

It is going far afield from remedying the decision in United States v. Rosenthal, 121 F. 862 (Cir. Ct. S.D.,N.Y., 1903) to say that Section 310 means that the Attorney General has the power to reduce to a nullity the office of District Attorney in any district. If the Attorney General can establish a branch office in Los Angeles and thus supplant the District Attorney's office in part, he may by the same process supplant it in toto.

This Honorable Court has never ruled upon the extent of the added powers given the Attorney General by Section 310. Nor was the question necessary to the decision in Sutherland v. International Ins. Co. of N. Y., 43 F. (2d) 969, 970 (C.C.A. 2nd, 1930) upon which the Circuit Court of Appeals seems to rest the decision in the case at bar (R. 96-97).

In the Sutherland case Judge Learned Hand reviewed the statutes and the meager case law relating to the representation of the United States in the courts, saying

(43 F. (2d) at pages 969-971):

"Section 485 of title 28 of the U. S. Code (28 USCA § 485), which had its origin in the Act of September 24, 1789, provides that 'it shall be the duty of every district attorney to prosecute, in his district . . . all civil actions in which the United States are concerned.' This was enlarged in 1906 (title 5, U. S. Code, § 310 (5 USCA § 310)), to include the Attorney General, 'any officer of the Department of Justice,' or attorney specially designated by the Attorney General . . . The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196, indeed involved only the question whether the Attorney General might, against the wishes of an informer, dismiss an appeal in a suit to confiscate confederate property under the Act of August 6, 1861 (12 Stat. 319), in which the informer had a half interest. However, the opinion announced obiter (page 457 of 7 Wall.) that it was the settled rule of United States courts to recognize no suits prosecuted in the name and for the benefit of the United States unless it was represented by a district attorney. While this is perhaps not conclusive, as it was not in any sense

made the basis of the decision, it cannot be disregarded, even though the citations given as authority, except a dictum of Judge Betts in U. S. v. McAvoy, 4 Blatch. 418, Fed. Cas. No. 15,654, do not bear out the text. Moreover, Justice Livingstone so ruled in U. S. v. Morris, 1 Paine, 209, Fed. Cas. No. 15,816, and so did Justice Blatchford in U. S. ex rel. West v. Doughty, 7 Blatch. 424, Fed. Cas. No. 14,986. So far as we can find these are the only cases which have dealt with the question for although U. S. v. Morris was affirmed in 10 Wheat. 246, 6 L. Ed. 314, the point was not discussed.

. . .

"While the authority is thus somewhat meagre, and the Supreme Court has never actually ruled upon it, the reasons are strong to take such a view. The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its courts. It has specifically authorized these to act, exacting from them compliance with the formalities required of a public officer, even when appointed by the Attorney General. . . . The Attorney General has powers of 'general superintendence

and direction' over district attorneys (title 5, U. S. Code, § 317 (5 USCA § 317)), and may directly intervene to 'conduct and argue any case in any court of the United States' (title 5, U. S. Code, § 309 (5 USCA § 309)), including even proceedings before magistrates (title 5, U. S. Code, § 310 (5 USCA § 310)). Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his 'superintendence and direction,' appears for the United States." (Underscoring added.)

The opinion in the case at bar stresses Judge Hand's statement that the Attorney General may "displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press." (R. 96-97.)

But it seems obvious from a full reading of Judge Hand's opinion that the words just quoted are but obiter dicta. Moreover, they do not support the contention that Section 310 empowers the Attorney General to establish a branch office in a district and supplant the office of the district attorney in such district.

We submit that more than a mere inference should exist to support a holding that Congress intended, by its enactment of Section 310 in 1906, the Attorney General should possess the power to reduce the office of United States District Attorney to a nullity in any district he might choose.

At the outset of the condemnation activities in the Southern District of California, as we have seen (R. 91-92), the Attorney General correctly interpreted Section 310 by providing for his special assistants to work in conjunction with and through the office of the District Attorney.

We submit that such was the intention of Congress in the enactment of Section 310; and we submit also that before the Attorney General may properly send forth special assistants into any district to function entirely independent of the office of the District Attorney in such district, there should be further action of Congress expressly granting such power.

c. The decision of the Circuit Court of Appeals at bar is believed to be in conflict with the decision of the Court of Appeals for the District of Columbia in Moody v. Wickard, 136 F. (2d) 801 (cert. denied 320 U. S. 775, 64 S. Ct. 89, 88 L. ed. (Adv. Ops.) 46 (1943)).

The writ of mandamus which the Circuit Court of Appeals has ordered to issue in the proceeding at bar would compel the respondent as District Judge to accept as valid a stipulation for judgment "in the land action referring to Tracts 21 and 22" (R. 93). This stipulation, providing for a money judgment directing payment of a portion of the funds deposited by the United States in the registry of the court, was signed on behalf of the United States by "Irl D. Brett, Special Assistant to the Attorney General" (R. 93).

Before this stipulation for judgment was presented to the respondent, the Secretary of War had signed and filed a "declaration of taking" as provided in 40 U.S.C.A. § 258a (adopted February 26, 1931, 46 Stat. 1421, C 307, § 1); and had deposited in the registry of the court "the sum of money estimated by said acquiring authority to be just compensation for the land taken."

Section 258a provides in part:

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount

of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. . . . "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the

amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

(Underscoring added.)

In the language of the Court of Appeals of the District of Columbia in Lee et al. v. United States, 58 F. (2d) 879, 880 (1932):

"These provisions, when carried into effect, followed by the taking of the property, amount to a pledge of the public faith and credit, and the judgment rendered in such proceeding is as binding on the United States as a judgment in a proper case would be upon the humblest individual in the land."

No extended argument is necessary to demonstrate that power in a Special Assistant to the Attorney General to stipulate separate judgments payable from the funds deposited in the registry of the court includes also the power in effect to stipulate a money judgment against the United States "for the amount of the deficiency." For if such power exists to stipulate away the funds deposited in the registry, that power necessarily includes the power, improvidently or otherwise, to render the United States liable for a deficiency limited only by the total "compensation finally awarded in respect of such lands."

In the words of United States v. Chemical Foundation, 272 U. S. 1, 20-21, 47 S. Ct. 1, 71 L. ed. 131, 145 (1926):

> "But no statute authorises . . . the Attorney General or other counsel in the case to consent to such a judgment. No such authority is necessary for the proper conduct of litigation on behalf of the United States, and there is no ground for implying that authority."

As the Court pointed out in Moody v. Wickard, supra, 136 F. (2d) 800, 803:

> " . . . the condemnation here was under the general condemnation statute, 40 U.S.C.A. §§ 257, 258. This statute nowhere permits an officer of the United States to consent to

the entry of a money judgment against the Government. United States v. Boston C. C. & N. Y. C. Co., 1 Cir., 271 F. 877."

See, also:

Steele v. United States, 113 U. S. 128, 5 S. Ct. 396, 28 L. ed. 952 (1885);

Bradford v. United States, 228 U. S. 446, 33 S. Ct. 576, 57 L. ed. 912 (1913);

United States v. Crary, 1 F. Supp. 406, 415 (D.C.W.D. Va. 1932).

Section 258a clearly contemplates that the court - and not some special assistant to the Attorney General - shall make a judicial ascertainment and determination of both (1) the amount of compensation to be paid for a given interest, and (2) the persons to whom such compensation shall be paid. Manifestly, the statute does not empower a special assistant to the Attorney General - or even the Attorney General himself - to relieve the court of the necessity of performing that judicial function by merely signing a stipulation.

It is no doubt quicker and more "efficient" to execute a stipulation stating the names of the persons who the special assistant has decided shall receive the money and how much shall be paid to each. But the statute nowhere authorizes such an obviously dangerous short cut.

The only provision in the statute dealing with the power of the Attorney General to stipulate is 40 U.S.C.A. § 258f (adopted Oct. 21, 1942, 56 Stat. 797, C. 618) which provides:

> "In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise."

If Congress had intended in 1942 to empower the Attorney General to fix by stipulation the amount of compensation to be paid, and to designate the persons entitled to receive payment, it seems certain such an important subject would have been included in Section 258f.

We therefore submit that the Circuit Court of Appeals, in directing that a writ of mandamus issue in the case at bar ordering the respondent District Judge to accept a stipulation for a money judgment, has not only "rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter," but

has also "decided a federal question in a way probably in conflict with applicable decisions of this Court."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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Counsel for the Petitioner, appointed as a special committee for such purpose by the Los Angeles Bar Association.

Gordon F. Hampton
of Counsel.

APPENDIX A

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner,

vs.

HONORABLE PEIRSON M. HALL, Judge of the United States District Court for the Southern District of California,

Respondent.

No. 10,736

Nov. 25, 1944

Before: MATHEWS, STEPHENS and HEALY, Circuit Judges.

STEPHENS, Circuit Judge.

The United States petitions this court for a writ of mandamus, directing the Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, to assume jurisdiction over the case of United States v. 1,960 Acres of Land in Riverside County, California, No. 2567-PH. For reasons which he regards as compelling Judge Hall refuses to take jurisdiction. This court issued its order to Judge Hall requiring him to show cause why the requested writ should not issue, and he has made his return. The facts herein related are

agreed to by the parties to this proceeding.

The matter in issue arises out of a Department of Justice policy adopted in the handling of the large number of land condemnation matters in which the United States is involved because of the present war. That department established an office in Los Angeles, California, separate and apart from the office of the United States District Attorney, staffed by attorney-officers of the Department of Justice, and supervised by a Special Assistant to the Attorney General. For a time after such establishment the United States District Attorney appeared as of record in litigation handled in such office.

In the fall of 1942, at the request of the Secretary of War, proceedings were brought on behalf of the United States to condemn 1,960 acres of land in Riverside County, California. The complaint was drafted by the Lands Division Office in Los Angeles and was signed "Leo V. Silverstein, United States (District) Attorney; Irl D. Brett, Special Assistant to the Attorney General (who had been specifically authorized by letter from Assistant Attorney General Littell to institute the action); Sylvan G. Bay, Special Attorney, Lands Division, Department of Justice, By Sylvan G. Bay, Attorneys for Plaintiff." An order for immediate possession issued. Two tracts embraced in one of the declarations of taking, Tracts 21 and 22, were subject to California State and Riverside County tax claims, for

which an estimated compensation of $20 was deposited in court.

In 1943, pursuant to a directive from the Attorney General, a more complete separation of the work of the Lands Division from that of the United States District Attorney's office in Los Angeles was effected. The District Attorney assented thereto upon the ground that the specialized work of the Lands Division could best be handled without his assistance. On September 1, 1943, the Lands Division ceased using the name of the United States District Attorney as counsel of record on pleadings in new suits, and since the tenth of that month the name of the United States District Attorney has not been used by the Lands Division in litigation both as to cases formerly filed in which the District Attorney appeared as attorney and as to new litigation. Subsequently, by a letter of October 19, 1943, addressed to Irl D. Brett, the Attorney General discussed the separation of Lands Division work from the United States District Attorney's office in Los Angeles and therein stated: "* * * I have delegated to you, and I hereby specifically direct that you exercise, plenary authority to sign and file on behalf of the United States, any and all pleadings, briefs, papers or documents in the District Court in and for the Southern District of California which you may consider necessary or proper for the conduct of such Lands Division cases as have been, or may be in the

future, placed and maintained under your supervision by the Department of Justice. Other attorneys and Special Attorneys of the Department of Justice assigned to your office may also appear of record in such proceedings and cases and otherwise participate in the conduct thereof as you may authorize and direct." A copy of the Attorney General's letter and a letter of Brett, acting for and at the instance of the Attorney General, and appointing M. B. Zimmerman, a duly appointed, qualified and acting special attorney in the Lands Division of the Department of Justice, co-counsel in the Riverside County land proceeding were filed in the district court.

A stipulation for judgment in the land action referring to Tracts 21 and 22 was presented to the court by co-counsel Zimmerman. The written stipulation was signed by all the interested parties, and on behalf of the United States it was signed in the following form:

"Irl D. Brett
Special Assistant to
The Attorney General
M. B. Zimmerman
Special Attorney
Lands Division
Department of Justice
By Irl D. Brett
Attorneys for Plaintiff"

The case was pending in the district court presided over by Judge Hall, and the latter declined to honor the stipulation and declined to sign the requested judgment on the ground that the district court was "without jurisdiction" because "the District Attorney must 'initiate and prosecute' condemnation proceedings on behalf of the Government" and that one who is "to assist the District Attorney" in such proceedings must be "'specially appointed' and 'specially directed' by the Attorney General in each case."

Mr. Brett himself then moved the district court to sign the stipulation. Again the court found a lack of jurisdiction of the matter "in view of the fact that counsel is regarded by the Court as not having the power to represent the United States Government." It should here be noted that at this juncture of the proceedings Judge Hall entertained the opinion that the stipulation must be signed by the District Attorney and also that an attorney or member of the Attorney General's staff had no standing in the case unless he had been specifically authorized to enter the specific case by the Attorney General.

Thereafter, Mr. Brett requested the Senior District Judge to reassign the case to another judge, but this request was refused. A letter from the Attorney General, bearing a date subsequent to Judge Hall's first ruling on the stipulation for judgment, specially appointing Mr. Brett and Mr. Zimmerman as attorneys to handle case No. 2567-PH

on behalf of the United States, was filed, and a motion was again made by Mr. Brett requesting Judge Hall to assume jurisdiction. The motion was denied on the grounds set forth in Judge Hall's original opinion that formal matters in the litigation must bear the authentication of the United States District Attorney as an attorney in the case.

After alleging the history of the case in the petition for the writ of mandamus, it is stated that Judge Hall's action interferes with the Attorney General's opinion as to the best manner of handling and disposing of condemnation matters arising in the Southern District of California. The petition concludes: "WHEREFORE, Your petitioner prays that this Court issue a writ of mandamaus compelling the Honorable Peirson M. Hall, Judge of the United States District Court for the Southern District of California, (1) to recognize the authority of the Attorney General to assign to Mr. Irl D. Brett and/or members of his staff, independently of the United States Attorney's office, condemnation matters arising in the Southern District of California, and more particularly the proceeding entitled United States v. 1,960 Acres of Land in Riverside County, California, No. 2567-PH; (2) to recognize the authority of Mr. Irl D. Brett and/or his assistants to represent the United States in such proceedings; and (3) to accept and assume jurisdiction over all pleadings and motions which Mr. Irl D. Brett and/or his assistants may file on behalf of the United

Judge Hall's court."

The questions presented herein are whether Judge Hall erred in finding lack of authority to represent the United States on the part of the government attorneys and whether, if he did so err, this court should direct him to accept jurisdiction in the premises through the issuance of our writ of mandamus.

Petitioner's prayer for the issuance of a writ is broad, requesting as it does that Judge Hall be directed to recognize the authority of the Attorney General to assign condemnation matters to Irl D. Brett and staff, to recognize the authority of Mr. Brett and his assistants to represent the United States in such proceedings, and to assume jurisdiction over all pleadings and motions filed by Mr. Brett and his staff on behalf of the United States in condemnation proceedings.

Our power to issue the writ prayed for is derived from and is limited by Judicial Code, Section 262 (28 USCA § 377). We quote the section, emphasizing the part thereof which prescribes and limits the basis of our jurisdiction and which shows that we have no jurisdiction to issue the writ except in aid of our appellate jurisdiction. "§ 377. (Judicial Code, section 262.) Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute,

which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. * * *."

A federal appellate court may by writ of mandamus compel an inferior court to take action in a case when the inferior court has a duty to do so and where the exercise of such power is necessary to protect the higher court's appellate jurisdiction. 28 USCA § 377; Ex parte United States, 287 US 241 (1932); Ex parte Simons, 247 US 231 (1918); McClelland v. Carland, 217 US 268 (1910); In re Grossmayer, 177 US 48 (1899); Ex parte Schollenberger, 96 US 369 (1877). We hold that we have no power to consider the petition in the broad and general nature of the prayer but that we have such power to the extent that the petition applies to the specific case out of which Judge Hall's rulings arose.

A district attorney has authority to condemn land requested, as in the instant case, by the Secretary of War for an air base since under 40 USCA § 256 legal services leading to the procurement of titles to public building sites, with certain exceptions not pertinent hereto, are to be rendered by United States district attorneys. The proceeding in question, therefore, was one which a district attorney had the authority to conduct. We shall presently see by quoting § 310 of Title 5 USCA that the measure of the district attorney's authority in litigation is made the measure of the Attorney General's authority and that there-

fore the instant proceeding falls within the latter official's authorization. The legal right of duly appointed deputies or assistants of the Attorney General to act when directed to do so by authority of the Attorney General presents no difficulty.

The thesis that the Attorney General can act in a legal proceeding cognizable by the district attorney only in conjunction with the district attorney or that an assistant or deputy Attorney General can act in such a case only where he is specifically authorized in each proceeding, as we see it, cannot be maintained.

In support of our conclusion as above expressed we refer to § 485 of Title 28 USCA and § 310 of Title 5 USCA. Section 485 provides in part: "It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned * * *." Section 310 of Title 5 USCA provides: "The Attorney General or any officer of the Department of Justice, * * * may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is

brought." It will be seen, as is so well expressed in Sutherland v. International Ins. Co. of N. Y., 43 Fed. 2d 969, 970 (CCA 2, 1930); that "This (power theretofore confined to the District Attorney) was enlarged in 1906 (title 5 U. S. Code § 310 (5 USCA § 310)), to include the Attorney General," or "'any officer of the Department of Justice,' * * *."

The Sutherland case further stated at page 970 that: "* * * The Attorney General has powers of 'general superintendence and direction' over district attorneys (title 5, U. S. Code, § 317 (5 USCA § 317)), and may directly intervene to 'conduct and argue any case in any court of the United States' * * *. Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press.[1] No such system is capable of operation unless his powers are exclusive, * * *. His power must be coextensive with his duties. * * *."

The following quotation from the opinion in Booth v. Fletcher, 101 Fed. 2d 676 (App. D. C., 1938), certiorari denied, further shows the views entertained in the matter

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[1] No importance should be given to the limitation seen in the phrase "institute those which they decline to press" for the reason that the case under consideration did not raise the issue beyond the terms of the expression.

by the Judges of the Second Circuit. At page 634: "* * * Moreover, even under the circumstances of the Throckmorton Case the court there indicated that the law would have been satisfied if the record had revealed that 'some one authorized to use his name' had appeared in behalf of the Attorney General, or if, 'without special regard to form, but in some way which the court can recognize' an appearance on behalf of the Attorney General had been made, or if in the argument of the case such an officer had appeared and participated." See also Shushan v. United States, 117 Fed. 2d 110, 114 (CCA 5, 1941); United States v. Amazon Industrial Chemical Corporation, 55 Fed. 2d 254 (D.C. Md., 1931), and for comment on liberal construction, see United States v. Sheffield Farms Co., 43 Fed. Supp. 1, 3 (D.C.N.Y., 1942).

It seems to us and we hold that § 310 of Title 5 USCA authorizes the Attorney General to institute litigation, to enter into pending litigation, and to cooperate with the district attorney or to proceed to handle such litigation independent of the district attorney, and any officer of the Department of Justice may act in the same manner and to the same extent providing he is authorized so to do by the Attorney General. Judge Hall is of the opinion that such authorization must be from the Attorney General or direct to each officer of the Department of Justice who is to enter the litigation and must be directed specifically to

each case he is to enter. We are of the opinion and so hold that the authorization may be direct to each designated officer of the Department or it may be to an officer in immediate supervision over several other such officers and may include such authorization to any or all of the several. And we are further of the opinion and we so hold that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to-wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office.

It further appears that this court would have appellate jurisdiction as to any judgment that may be entered in said case and that this court has authority to issue its writ of mandamus in aid of such appellate jurisdiction. We conclude that our legal discretion should be exercised in favor of the issuance of such writ, and we therefore direct the issuance of the writ of mandamus in accordance with the principles and limitations mentioned in this opinion.

In his "Response to Order to Show Cause" the learned district judge denies what he terms "the insinuations contained in said Petition * * * and in the argument attached to said Petition, to the effect that his failure to act

in said matter has been due to arbitrary unwillingness on his part, * * *." We have carefully reexamined the petition and the attached argument, and we can fine no insinuations of arbitrary unwillingness in either instrument. In fact any remote suggestion of anything of the kind must instantly be dismissed as the memorandum of opinion prepared and filed by the judge in support of his rulings demonstrate a high degree of industry and earnest desire to prevent complications so often the consequence of error.

Let the writ issue in accordance herewith.

(Endorsed:) Opinion. Filed Nov. 25, 1944. Paul P. O'Brien, Clerk.

No. 1012

In the Supreme Court of the United States

OCTOBER TERM, 1944

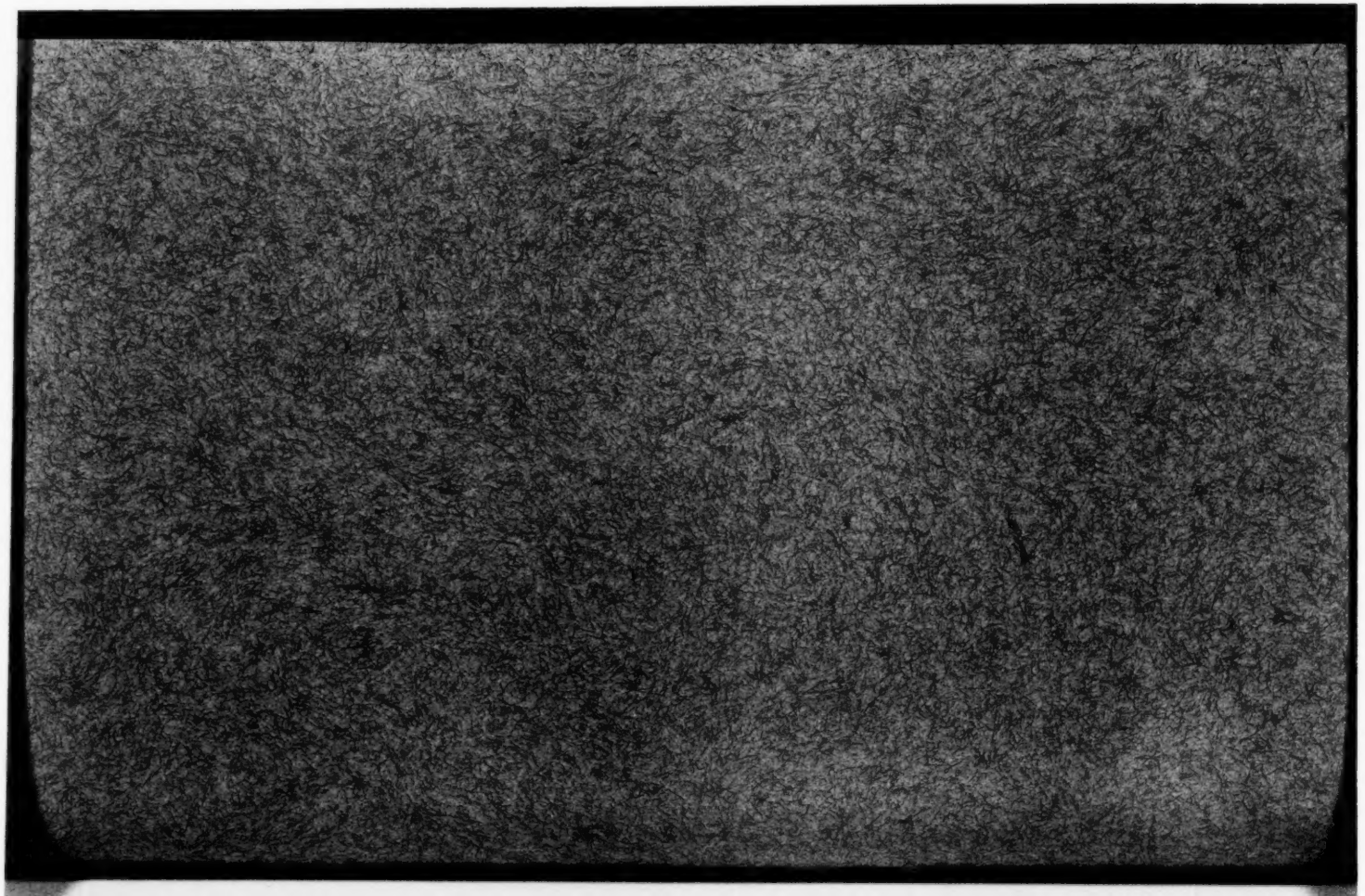
HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1012

HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 91-98) in the mandamus proceeding is reported in 145 F. 2d 781. The opinion of the district court in the condemnation suit out of which the mandamus proceedings arose is reported in 54 F. Supp. 867, *sub nom. United States* v. *1,960 Acres of Land.*

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on November 25, 1944 (R. 90). A petition for rehearing was denied December 30, 1944 (R. 99). The petition for a writ of certiorari was filed on March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Attorney General of the United States has authority to assign condemnation cases to Special Attorneys of the Department of Justice to be handled independently of the United States Attorney's office.

STATUTES INVOLVED

The relevant statutes defining the functions and powers of the Attorney General and the United States Attorneys are set out in the Argument, *infra,* pp. 8–9, 11–15.

STATEMENT

The Secretary of War on November 3, 1942, requested the Attorney General of the United States to institute condemnation proceedings under the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. Supp. App., III, 632, to acquire the fee title to and immediate possession of 1,960 acres of land in Riverside

County, California, for use in connection with the Desert Central Air Support Command Base (R. 17–18). By an air mail letter written the same day "Mr. Irl D. Brett, Special Assistant to the Attorney General, Federal Building, Los Angeles, California," [1] was directed to institute the requested proceedings, this letter being signed, "For the Attorney General" by "NORMAN M. LITTELL, Assistant Attorney General" (R. 19–20). Mr. Brett filed the requested proceeding on November 9, 1942, the complaint being signed by "Leo V. SILVERSTEIN, United States Attorney; [2] IRL D. BRETT, Special Assistant to the Attorney General; SYLVAN G. BAY, Special Attorney, Lands Division, Department of Justice, By SYLVAN G. BAY, Attorneys for Plaintiff" (R. 21–29). Judge Peirson M. Hall signed an order for immediate possession the same day. Included in the proceedings were Tracts 21 and 22 containing 20 acres owned by John J. Zelter, *et ux.*, subject to certain tax claims by the State of California and

[1] Because of the large volume of condemnation work in Southern California arising out of the war, the Department of Justice had established a special office in Los Angeles to handle condemnation matters in that area. Mr. Irl D. Brett, Special Assistant to the Attorney General, was placed in charge of this office with a staff of special attorneys particularly familiar with condemnation law.

[2] Until the summer of 1943 the name of the United States Attorney was used in all condemnation pleadings filed in the Southern District of California.

Riverside County. These tracts were embraced in Declaration of Taking No. 2 filed January 6, 1943, $20 being deposited in the court as estimated compensation therefor (cf. R. 34–35). No judgment was entered on the declaration of taking.[3]

In August 1943 it was deemed advisable, for administrative reasons, to place all condemnation matters in the Southern District of California under the direct supervision of Mr. Brett. After a three way exchange of correspondence between the Attorney General, the United States Attorney, and Mr. Brett, the Attorney General on October 19, 1943, formally confirmed the separation of Lands Division work in Southern California from the office of the United States Attorney, and delegated to and directed Mr. Brett to exercise "plenary authority to sign and file on behalf of the United States, any and all pleadings, briefs, papers or documents in the District Court in and for

[3] It is Judge Hall's position, and on this point he is undoubtedly correct, that title passes upon the filing of a valid declaration of taking. *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (C. C. A. 7); *Catlin* v. *United States*, No. 419, October Term, 1944, decided by this Court February 26, 1945. He therefore regards the entry of a judgment on a declaration of taking as a useless act. Such judgments are, however, quite useful for recordation and other purposes, and all District Judges throughout the United States, except two or three, have acquiesced in the Lands Division practice of obtaining formal "judgments" on declarations of taking. See *Oakland* v. *United States*, 124 F. 2d 959 (C. C. A. 9); cf. *Catlin* v. *United States*, No. 419, October Term, 1944, decided February 26, 1945.

the Southern District of California which you may consider necessary or proper for the conduct of such Lands Division cases as have been, or may be in the future, placed and maintained under your supervision by the Department of Justice. Other attorneys and Special Attorneys of the Department of Justice assigned to your office may also appear of record in such proceedings and cases and otherwise participate in the conduct thereof as you may authorize and direct." (R. 9–10.)

A photostatic copy of this letter was filed in the District Court for the Southern District of California on November 22, 1943, together with a letter by Mr. Brett designating M. D. Zimmerman as co-counsel in the Riverside County condemnation proceeding (R. 11, 33, 87).

Mr. Zimmerman thereupon presented to the court a "stipulation for judgment" on Tracts 21 and 22, in the amount deposited in court, this stipulation being signed by Riverside County, by the State of California, and by John J. Zelter and Pearl M. Zelter (R. 34–37). The court, Judge Peirson M. Hall presiding, took the request under advisement.

On January 4, 1944, Judge Hall handed down an opinion in which he held that the "District Attorney must 'initiate and prosecute' condemnation proceedings on behalf of the Government" in order to give the court jurisdiction and that when

other persons are appointed "to assist the District Attorney" they must be " 'specially appointed' and 'specially directed' by the Attorney General in each case." *United States* v. *1,960 Acres of Land,* 54 F. Supp. 867, 882.

In order to avoid the question whether Mr. Brett could delegate authority to Mr. Zimmerman, Mr. Brett thereupon personally presented the matter to the District Judge who still refused to assume jurisdiction "in view of the fact that counsel is regarded by the Court as not having the power to represent the U. S. Government" (R. 38).

Not desiring to resort to mandamus unless all other remedies were exhausted, Mr. Brett asked the Senior District Judge to reassign the case to one of the other judges for the Southern District of California. Senior District Judge McCormick, having ascertained that Judge Hall was unwilling to have the case reassigned, refused Mr. Brett's request. (R. 39–40.)

In a further effort to narrow the issues the Attorney General addressed to Mr. Brett and to Mr. Zimmerman on February 4, 1944, specific authorization to handle the case immediately involved (R. 13–14). This letter was filed with the District Court on February 9, 1944, together with a motion formally requesting Judge Hall to assume jurisdiction of the Government's motion to fix the

compensation for Tracts 21 and 22 in the amounts agreed to by the parties, and to take such other proceedings as the court should deem meet in the premises to fix and determine the just compensation to be paid for the taking of these tracts (R. 41–43). Again the court took the matter under advisement. On March 13, 1944, Judge Hall denied the motion on the grounds set forth in his opinion of January 4, 1944 (R. 44–45).

Since refusal by Judge Hall to recognize the Attorney General's authority to assign condemnation cases to Special Attorneys seriously imperiled the orderly handling and disposal of condemnation matters in the Southern District of California and in several other districts where a similar practice prevailed, and since the decision, based as it was on jurisdictional grounds, would if allowed to stand cast doubt on title to tens of thousands of acres of other lands acquired in condemnation proceedings not signed by the United States Attorneys, the United States filed a petition for mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel Judge Hall to recognize the Attorney General's authority to assign condemnation matters to Special Attorneys of the Department of Justice to be handled independently of the United States Attorney's office, and to assume jurisdiction over pleadings signed and tendered on behalf of the United States by

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such attorneys (R. 1–16). The court below entertained the petition (R. 3), issued an order to show cause (R. 64), and sustained the authority of the Attorney General to assign particular kinds of litigation to Special Attorneys of the Department of Justice to be handled independently of the United States Attorney's office (R. 91–98). The writ of mandamus issued accordingly (R. 90). A petition for rehearing having been subsequently filed and denied (R. 99), petitioner now seeks review by certiorari.

ARGUMENT

1. Contrary to petitioner's contentions (Pet. 15–26), the Attorney General of the United States has ample statutory authority to assign condemnation cases to Special Attorneys of the Department of Justice to be handled independently of the United States Attorney's office.

The Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. III, 632, under which the present condemnation proceedings were brought, expressly provides that such proceedings are to be in accordance with the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257. That Act provides that in every case in which the Secretary of the Treasury or other Government officer is authorized to procure real estate for public uses, he shall be authorized to acquire the same for the United

States by condemnation. The Act also provides that the United States District Courts of the districts wherein such real estate is located shall have jurisdiction of proceedings for such condemnation. It further states that it "shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, * * * or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice."

Executive Order No. 6166 of June 10, 1933, 5 U. S. C. 124–132, issued pursuant to the Government Reorganization Acts of 1932 and 1933, further provides:

> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

In 38 Op. A. G. 124 (1934) Attorney General Cummings placed the following construction on this Executive Order:

> The effect of the above quoted provision is to vest in the Attorney General exclusive control of any case after it has been referred to his department.

It therefore follows that when the Secretary of War requested the Attorney General on November 3, 1942, to institute condemnation proceedings to acquire land needed for use in connection with the Desert Control Air Support Command Base, exclusive control of such proceedings was thereby vested in the Attorney General.

In discharging the functions thus vested in him the Attorney General is not required to act through the United States Attorney. Congress has conferred on the Attorney General broad authority to determine who shall represent the United States in the handling of particular cases in the federal district courts. He may operate through the Solicitor General, through Special Assistants to the Attorney General or through Special Attorneys of the Department of Justice, independently of the United States Attorney's office. This fact is clear from an examination of the relevant statutes.

The office of the United States Attorney was created by Section 35 of the Judiciary Act of

September 24, 1789, 1 Stat. 73, 92. His duties were there defined in much the same language as that now used in 28 U. S. C. 485:

> It shall be the duty of every district attorney, to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned * * *.

The office of Attorney General was established by the same section of the Judiciary Act. His functions, as there defined, were quite limited and included no supervisory control over the United States Attorneys. 1 Op. A. G. 608 (1823). This chaotic situation was remedied by the Act of August 2, 1861, 12 Stat. 285, and by the Act of June 22, 1870, 16 Stat. 162, creating the Department of Justice and conferring on the Attorney General the general superintendence and direction of all district attorneys. Further powers were delegated to the Attorney General by the Act of June 30, 1906, 34 Stat. 816. See *United States* v. *Atlantic Commission Co.*, 45 F. Supp. 187, 191 (E. D. N. C.). As a result of this legislation the Attorney General's powers within the various districts of the United States have been much broadened. The relevant sections of the Code define his powers and duties as follows:

> 5 U. S. C. 22: The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its

officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.[5]

5 U. S. C. 291: There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof.[6]

5 U. S. C. 302: Whenever the Solicitor General, an attorney, an assistant attorney, a special assistant to the Attorney General, or any other officer of the Department of Justice is sent by the Attorney General to any State, District, Territory, or country to attend to any interest of the United States the person so sent shall receive, in addition to his salary and the necessary expenses of travel, his actual expenses incurred for sub-

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[5] Section 8 of the Department of Justice Act of June 22, 1870, 16 Stat. 162, 163, which is one of the sources of 5 U. S. C. 22, reads as follows: "That the Attorney-General is hereby empowered to make all necessary rules and regulations for the government of said Department of Justice, and for the management and distribution of its business."

[6] This Court has pointed out that Congress in providing for an Attorney General "must have had reference to the similar office with the same designation existing under the English law," and that "when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law." *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 280. Consequently, "the primary broad power of the Attorney General is in part inherent, appertaining to the office, and in part derived from various statutes and decisions." 38 Op. A. G. 124, 126 (1934); 38 Op. A. G. 98, 99 (1934).

sistence, not to exceed $6 per day while absent from the seat of government, the account thereof to be verified by affidavit.

5 U. S. C. 306: The officers of the Department of Justice, under the direction of the Attorney General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of departments, and the heads of bureaus and other officers in the departments, to discharge their respective duties; * * *.[7]

5 U. S. C. 309: * * * the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so.

5 U. S. C. 310: The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including

[7] The War Department, Navy Department, Maritime Commission, and other war agencies, in order to discharge their duties, must acquire land, buildings, etc. The task of acquiring such property for these agencies has been expressly conferred upon the Attorney General by the General Condemnation Act of August 1, 1888, 40 U. S. C. 257 (*supra*, pp. 8–9).

grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

5 U. S. C. 311: The Attorney General may require any solicitor or officer of the Department of Justice to perform any duty required of the department or any officer thereof.

5 U. S. C. 312: The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, * * *.

5 U. S. C. 315: Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General or to some one of the district attorneys, or as a special attorney, as the nature of the appointment may require; * * *.

5 U. S. C. 316: The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States

> in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.
>
> 5 U. S. C. 317: The Attorney General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; * * *.

The effect of the foregoing statutes was well analyzed by Judged Learned Hand in *Sutherland* v. *International Ins. Co. of New York*, 43 F. 2d 969, 970 (C. C. A. 2), certiorari denied, 282 U. S. 890, where he stated that the Attorney General "may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his 'superintendence and direction,' appears for the United States."

See also *Booth* v. *Fletcher*, 101 F. 2d 676 (App. D. C.), certiorari denied, 307 U. S. 628; *United States* v. *Sheffield Farms Co.*, 43 F. Supp. 1, 3 (S. D. N. Y.)

Under these cases there would seem to be no reason why the Attorney General may not displace the United States Attorney in particular cases by assigning them to special assistants and other departmental officers to be handled independently of the United States Attorney's office. 5 U. S. C. 310 provides that "any officer of the Department of Justice" or "any attorney or counselor specially appointed" may conduct "any kind of legal proceeding, civil or criminal," "when thereunto specifically directed by the Attorney General." Section 310 does not require a specific direction in each case. A specific direction to handle a particular class or *kind* of case is sufficient. "To say that an assistant cannot appear before the grand jury, unless he has been designated by the Attorney General to do so in each particular case, seems to me unnecessarily narrow and technical. * * * As the Attorney General can unquestionably make case by case designations, to give the statute the narrower interpretation would result only in useless red tape." *United States* v. *Martins,* 288 Fed. 991 (D. Mass.); cf. *United States* v. *Amazon Industrial Chemical Corp.,* 55 F. 2d 254 (D. Md.); *Shushan* v. *United States,* 117 F. 2d 110, 113–114 (C. C. A. 5), certiorari denied, 313 U. S. 574; *United States* v. *Sheffield Farms Co.,* 43 F. Supp. 1, 2 (S. D. N. Y.). Be that as it may, the Attorney General by letter of February 4, 1944 (R. 13–14) specifically empowered Mr. Brett to appear

as attorney of record for and on behalf of the United States in this particular condemnation proceeding, to prosecute it to a conclusion, and to sign and file all pleadings, stipulations, and other documents therein which he deemed necessary or expedient.

From the foregoing statutory provisions and adjudications, it seems clear that the Attorney General may designate "any officer of the Department of Justice" to handle specific cases in the various district courts of the United States and to that extent displace United States Attorneys.[8] This conclusion is in accord with the long continued administrative construction placed on these statutes by the Attorney General, and is especially desirable in condemnation cases.

Condemnation proceedings are somewhat technical and specialized in nature. For this reason a large amount of condemnation work in the field has been handled by Special Assistants to the Attorney General and by Special Attorneys of the Lands Division, the division of the Department of Justice charged with the immediate supervision of condemnation work. With the great increase in federal condemnation proceedings resulting from public works projects commencing in the early

[8] Compare this Court's observation in *United States* v. *Johnson*, No. 43, October Term 1944: "Prosecution of federal crimes are under the general supervision of the Attorney General of the United States; United States Attorneys do not exercise autonomous authority."

thirties, the prevention of soil erosion and reforestation programs of a few years later, and the defense and war needs of the present, it has been necessary to establish special staffs of field attorneys to handle condemnation work in those areas where large amounts of land are being acquired for war and other purposes. In some 26 districts of the United States condemnation work is largely handled by Special Attorneys of the Department of Justice, and under the practice which presently prevails in six districts the pleadings are not even signed by the United States Attorney.[9] In many

[9] An examination of the records of this Court in the case of *Westchester County* v. *United States*, No. 251, October Term 1944, certiorari denied October 9, 1944, will show that the condemnation petition was signed and filed by "Harry T. Dolan, Special Assistant to the Attorney General," and not by the United States Attorney or members of his staff. The Ninth Circuit judicially knew that pleadings in a number of condemnation appeals which it had decided were likewise filed on behalf of the United States by Special Attorneys of the Department of Justice. E. g. *United States* v. *Marin*, 136 F. 2d 388 (from the Northern District of California); *United States* v. *Fee*, 138 F. 2d 158 (from the District of Oregon); *United States* v. *Merchants Transfer & Storage Co.*, 144 F. 2d 324 (from the Western District of Washington). In the last cited case, decided while the present mandamus proceeding against Judge Hall was under advisement, the court pointedly referred to the fact that (p. 325) that suit had been instituted "through a special assistant to the Attorney General." After Judge Hall's decision was published various landowners in the Eastern District of New York, where a similar practice prevails of having condemnation cases handled exclusively by a Special Assistant to the Attorney General, sought to set aside various condemnation

of these districts the headquarters of the condemnation attorneys are located in different buildings from those of the United States Attorneys and occasionally in different cities in closer proximity to some important condemnation project. In such instances it would distinctly impede the work of the Lands Division in condemnation cases, especially war power takings where possession must be obtained as expeditiously as possible, to have to refer pleadings and the scores of other instruments to the United States Attorneys for even formal approval. By means of this administrative setup the time which elapses between the receipt by the Department of a request for condemnation and the subsequent filing of a condemnation proceedings now averages less than five days. In recognition of the speed with which the Lands Division has been able to institute condemnation proceedings and to obtain immediate possession of property, the Truman Committee recommended that more and more of the land which is needed by the Government for war purposes should be acquired by condemnation rather than by direct purchase. Third Annual Report of Special Committee Investigating the

judgments on jurisdictional grounds. Judge Inch summarily rejected this contention, saying: "If the case relied on by defendant, *U. S.* v. *1960 Acres of Land*, 54 F. Supp. 867, is the reason for such position taken by him, this court regrets that it is unable to agree with such decision." *United States* v. *Certain Lands, etc.*, 57 F. Supp. 157 (E. D. N. Y.).

National Defense Program, 78th Cong., 2d sess., S. Rept. No. 10, pt. 16, pp. 121–132.

Congress has been fully apprised of this Departmental practice of establishing regional field offices to handle condemnation cases in those areas where large amounts of land are being acquired for war purposes. In fact, in appropriations acts for recent years Congress has required the Department of Justice to make semi-annual reports listing the names of Special Assistants to the Attorney General and describing their duties See Act of July 1, 1943, 57 Stat. 271, 285; Act of June 28, 1944, Public No. 365. With this information before them it is significant that Congress has prohibited "the establishment and maintenance of permanent regional offices of the Antitrust Division" while at the same time making an appropriation for the Lands Division of $4,275,000 "for personal services in the District of Columbia *and elsewhere.*" Act of June 28, 1944, Public No. 365.

Authorities relied on by petitioner (Pet. 15–17) for the proposition that the handling of condemnation cases is one of the duties of the United States Attorney merely stand for the principle that such officer is not entitled to any additional compensation for the performance of such functions, it being his duty to render such service when requested by the Attorney General. This does not mean that the Attorney General may not

assign these duties on special occasions to other officers of the Department of Justice. See 5 U. S. C. 309, 310, 311.

2. The last question which petitioner seeks to raise (Pet. 13, 14, 27–33) is not presented by the record in the instant case. In its motion of February 9, 1944 (R. 41–43) the Government did not ask the court to enter judgment in the amount stipulated to by the parties, although such a motion might well have been proper under such decisions as *Danforth* v. *United States*, 308 U. S. 271, and *Wachovia Bank & Trust Co.* v. *United States*, 98 F. 2d 609 (C. C. A. 4). It merely requested the court "to accept and assume jurisdiction of this cause and the subject matter of this particular motion," "to fix a time and place for consideration of a Stipulation for Judgment," "to take such other proceedings as the Court shall deem meet in the premises whereby to fix and determine the just compensation to be paid by plaintiff," and "to enter judgment herein, determining the amount of just compensation to be paid by the plaintiff" (R. 42).

Similarly, in the petition for mandamus the relief was limited to a request that Judge Hall be compelled to assume jurisdiction of pleadings filed on behalf of the United States by Special Attorneys of the Department of Justice (R. 15–16). In view of a previous ruling by the Ninth Circuit in another mandamus case (*United States*

v. *Fee,* 138 F. 2d 158), the United States expressly stated in its brief in support of the petition for the writ that "no attempt is here made, or in the motion filed below, to control what action Judge Hall may take on the motion once he undertakes to exercise jurisdiction. * * * Mandamus is sought merely to compel him to assume jurisdiction over pleadings and motions filed on behalf of the United States by attorneys acting under the direction of the Attorney General of the United States" (R. 62). The questions, therefore, whether a court must enter judgment in the amount stipulated to by the parties and whether officers of the United States may enter into such stipulations, are not involved in this case.

The case of *Moody* v. *Wickard,* 136 F. 2d 801 (App. D. C.), certiorari denied, 320 U. S. 775, relied on by petitioner (Pet. 14, 27) as establishing a conflict, is not in point. In that case no declaration of taking was filed and the determination of the award was merely "an offer subject to acceptance by the condemnor." *Danforth* v. *United States,* 308 U. S. 271, 284. The district court was, therefore, without jurisdiction to enter a money judgment against the United States. In the instant case a declaration of taking has been filed, the Government is thus "irrevocably committed" to pay just compensation, and the court has jurisdiction to enter a money judgment

against the United States. Act of February 26, 1931, 46 Stat. 1422, 40 U. S. C. 258c. In such circumstances the Attorney General may stipulate as to value or otherwise compromise the litigation pursuant to Executive Order No. 6166, *supra*, p. 9. Thus, the Attorney General in his letter of February 4, 1944 (R. 13–14), quite properly approved the prior stipulations filed in this proceeding, including the stipulation fixing compensation for tracts 21 and 22 in the exact amount deposited in court by the War Department.

CONCLUSION

The question presented was correctly decided by the court below, there is no conflict of decisions, and the petition for writ of certiorari should be denied.

Respectfully submitted.

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